

1
2 UNITED STATES DISTRICT COURT
3 WESTERN DISTRICT OF WASHINGTON
4 AT TACOMA

5 VIRGIL REED,

6 Plaintiff,

7 v.

8 NANCY A. BERRYHILL, Acting
Commissioner of Social Security,¹

9 Defendant.

CASE NO. C16-01559BHS

ORDER REVERSING AND
REMANDING THE
COMMISSIONER'S DECISION

10 **I. BASIC DATA**

11 Type of Benefits Sought:

12 (X) Disability Insurance

13 (X) Supplemental Security Income

14 Plaintiff's:

15 Sex: Male

16 Age: 41 at application date

17 Principal Disabilities Alleged by Plaintiff: Learning disorder, dyslexia, depression,
18 anxiety, personality disorder, hearing and vision loss, carpal tunnel syndrome, and ankle,
19 back, and hip pain

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21 ¹ Nancy A. Berryhill is now the Acting Commissioner of the Social Security
22 Administration. Pursuant to Federal Rule of Civil Procedure 25(d), Nancy A. Berryhill is
substituted for Carolyn W. Colvin as defendant in this suit. The Court directs the clerk to update
the docket, and all future filings by the parties should reflect this change.

1 Disability Allegedly Began: July 11, 2012
2 Principal Previous Work Experience: Bartender, cook, truck driver, and forklift operator
3 Education Level Achieved by Plaintiff: GED

4 **II. PROCEDURAL HISTORY—ADMINISTRATIVE**

5 Before ALJ Glenn G. Meyers:

6 Date of Hearing: April 14, 2015; hearing transcript AR 37-83

7 Date of Decision: June 24, 2015

8 Appears in Record at: AR 13-36

9 Summary of Decision:

10 The claimant has not engaged in substantial gainful activity since
11 July 11, 2012, the amended alleged onset date. The claimant has the
12 following severe impairments: carpal tunnel syndrome, history of
13 lumbar degenerative disc disease, depressive disorder, anxiety
14 disorder, attention deficit disorder/attention deficit hyperactivity
15 disorder, and substance abuse in remission. The claimant does not
16 have an impairment or combination of impairments that meets or
17 medically equals the severity of one of the listed impairments in 20
18 C.F.R. Part 404, Subpart P, Appendix 1.

19 The claimant has the residual functional capacity (“RFC”) to
20 perform light work as defined in 20 C.F.R. §§ 404.1567(b) and
21 416.967(b) except he can engage in unskilled, routine, repetitive
22 work. He frequently can use hands to finger, feel, push, pull, can
 have no contact with the public, can work in close proximity to but
 not in coordination with coworkers, and can be off task at work ten
 percent of the time but would still meet minimum production
 requirements.

23 The claimant is unable to perform any past relevant work.
24 Considering the claimant’s age, education, work experience, and
25 RFC, there are jobs existing in significant numbers in the national
26 economy that the claimant can perform. Therefore, the claimant has
27 not been under a disability, as defined in the Social Security Act,
28 from October 1, 2009, through the date of the decision.

1 Before Appeals Council:

2 Date of Decision: August 24, 2016

3 Appears in Record at: AR 1-6

4 Summary of Decision: Declined review

5 **III. PROCEDURAL HISTORY—THIS COURT**

6 Jurisdiction based upon: 42 U.S.C. § 405(g)

7 Brief on Merits Submitted by (X) Plaintiff (X) Commissioner

8 **IV. STANDARD OF REVIEW**

9 Pursuant to 42 U.S.C. § 405(g), the Court may set aside the Commissioner's
10 denial of Social Security benefits when the ALJ's findings are based on legal error or not
11 supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
12 1211, 1214 n.1 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than
13 a preponderance, and is such relevant evidence as a reasonable mind might accept as
14 adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971);
15 *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for
16 determining credibility, resolving conflicts in medical testimony, and resolving any other
17 ambiguities that might exist. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995).
18 While the Court is required to examine the record as a whole, it may neither reweigh the
19 evidence nor substitute its judgment for that of the ALJ. See *Thomas v. Barnhart*, 278
20 F.3d 947, 954 (9th Cir. 2002). "Where the evidence is susceptible to more than one
21 rational interpretation, one of which supports the ALJ's decision, the ALJ's conclusion
22 must be upheld." *Id.*

V. EVALUATING DISABILITY

The claimant, Virgil Reed (“Reed”), bears the burden of proving that he is disabled within the meaning of the Social Security Act (“Act”). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment which has lasted, or is expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§ 423(d)(1)(A), 1382c(3)(A). A claimant is disabled under the Act only if his impairments are of such severity that he is unable to do his previous work, and cannot, considering his age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999).

12 The Commissioner has established a five-step sequential evaluation process for
13 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R.
14 § 416.920. The claimant bears the burden of proof during steps one through four.
15 *Valentine v. Comm'r, Soc. Sec. Admin.*, 574 F.3d 685, 689 (9th Cir. 2009). At step five,
16 the burden shifts to the Commissioner. *Id.*

VI. ISSUES ON APPEAL

1. Did the ALJ err in assessing the medical evidence in the record?
 2. Did the ALJ err in assessing the lay witness testimony in the record?
 3. Did the ALJ err in determining that Reed could perform other work at step five?

1 **VII. DISCUSSION**

2 Reed appeals the Commissioner's decision denying him disability benefits,
3 arguing that the ALJ committed several errors requiring reversal. Dkt. 9. The Court
4 addresses the alleged errors in turn.

5 **A. Medical Evidence**

6 Reed argues that the ALJ erred in evaluating the medical evidence in the record.
7 *See id.* at 3-14. The ALJ is responsible for determining credibility and resolving
8 ambiguities and conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715,
9 722 (9th Cir. 1998). In resolving questions of credibility and conflicts in the evidence, an
10 ALJ's findings "must be supported by specific, cogent reasons." *Id.* at 725. The ALJ can
11 do this "by setting out a detailed and thorough summary of the facts and conflicting
12 clinical evidence, stating his interpretation thereof, and making findings." *Id.*

13 The ALJ must provide "clear and convincing" reasons for rejecting the
14 uncontradicted opinion of either a treating or examining physician. *Lester v. Chater*, 81
15 F.3d 821, 830 (9th Cir. 1996). Even when a treating or examining physician's opinion is
16 contradicted, that opinion "can only be rejected for specific and legitimate reasons that
17 are supported by substantial evidence in the record." *Id.* at 830-31.

18 **1. Anselm Parlatore, M.D.**

19 Reed argues that the ALJ erred by failing to give a specific and legitimate reason
20 supported by substantial evidence to discount the opinion of examining psychiatrist
21 Anselm Parlatore, M.D. *See* Dkt. 9 at 3-7. The Court agrees.

1 Dr. Parlatore examined Reed in June of 2013 and diagnosed him with academic
2 learning disorder, depression, anxiety, polysubstance abuse, and personality disorder not
3 otherwise specified. *See AR 423.* Dr. Parlatore opined that Reed had severe limitations
4 in his ability to communicate and perform effectively in a work setting, maintain
5 appropriate behavior in a work setting, set realistic goals and plan independently, and
6 complete a normal workday or workweek without interruptions from psychologically-
7 based symptoms. *See AR 424.* Dr. Parlatore opined that Reed had several marked
8 cognitive and social limitations as well. *See id.* The ALJ gave Dr. Parlatore's opinion
9 little weight because it was "not consistent with the objective evidence of record." *See*
10 AR 28.

11 However, "an ALJ errs when he rejects a medical opinion or assigns it little
12 weight while doing nothing more than ignoring it, asserting without explanation that
13 another medical opinion is more persuasive, or criticizing it with boilerplate language
14 that fails to offer a substantive basis for his conclusion." *Garrison v. Colvin*, 759 F.3d
15 995, 1012-13 (9th Cir. 2014) (citing *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir.
16 1996)). As the Ninth Circuit has stated:

17 To say that medical opinions are not supported by sufficient objective
18 findings or are contrary to the preponderant conclusions mandated by
19 the objective findings does not achieve the level of specificity our prior
cases have required, even when the objective factors are listed seriatim.
The ALJ must do more than offer his conclusions. He must set forth his
own interpretations and explain why they, rather than the doctors,' are
correct.

21 *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988) (internal footnote omitted).
22 Furthermore, the one page in the medical record cited by the ALJ as evidence of the

1 inconsistency between Dr. Parlatore's opinion and the objective evidence does not appear
2 to establish any inconsistency. *See* AR 28, 605.

3 The ALJ also noted that if Reed "had an actual [Global Assessment of Functioning
4 ("GAF") score] of 47, he would be unable to do the daily activities he described at the
5 hearing." AR 28. A GAF score is a "rough estimate of an individual's psychological,
6 social, and occupational functioning used to reflect the individual's need for treatment."

7 *Vargas v. Lambert*, 159 F.3d 1161, 1164 n.2 (9th Cir. 1998). Therefore, the ALJ's reason
8 for discounting the GAF score is not sufficient to discount the specific workplace
9 limitations to which Dr. Parlatore opined after reviewing medical records and performing
10 a clinical interview and a mental status examination. *See* AR 422-26. The ALJ erred by
11 failing to provide a specific and legitimate reason supported by substantial evidence for
12 giving little weight to Dr. Parlatore's opinion regarding Reed's workplace functioning.

13 The Ninth Circuit has "recognized that harmless error principles apply in the
14 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
15 (citing *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006)
16 (collecting cases)). The Ninth Circuit noted that "in each case we look at the record as a
17 whole to determine [if] the error alters the outcome of the case." *Id.* The Ninth Circuit
18 has "adhered to the general principle that an ALJ's error is harmless where it is
19 'inconsequential to the ultimate nondisability determination.'" *Id.* (quoting *Carmickle v.*
20 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations
21 omitted). The court noted the necessity to follow the rule that courts must review cases
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1 “‘without regard to errors’ that do not affect the parties’ ‘substantial rights.’” *Id.* at 1118
2 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

3 Had the ALJ fully credited Dr. Parlatore’s opinion, the RFC would have included
4 additional limitations, as would the hypothetical questions posed to the vocational expert.
5 As the ALJ’s ultimate determination regarding disability was based on the testimony of
6 the vocational expert on the basis of an improper hypothetical question, this error affected
7 the ultimate disability determination and is not harmless.

8 **2. Luci Carstens, Ph.D.**

9 Reed argues that the ALJ erred by failing to give a specific and legitimate reason
10 supported by substantial evidence to discount the opinion of state agency psychological
11 consultant Luci Carstens, Ph.D. *See* Dkt. 9 at 7-8. The Court agrees.

12 Dr. Carstens reviewed the medical evidence in June of 2013 and opined that Reed
13 had severe limitations in his ability to communicate and perform effectively in a work
14 setting, maintain appropriate behavior in a work setting, set realistic goals and plan
15 independently, and complete a normal workday or workweek without interruptions from
16 psychologically-based symptoms. *See* AR 502. Dr. Carstens opined that Reed had
17 several marked cognitive and social limitations as well. *See id.* The ALJ gave Dr.
18 Carstens’s opinion little weight because it was “not consistent with the objective
19 evidence” and because Dr. Carstens gave too much weight to the examining physicians’
20 opinions. *See* AR 27.

21 As he did with Dr. Parlatore’s opinion, the ALJ erred here by failing to offer any
22 more than his conclusions. *See Embrey*, 849 F.2d at 421-22. The ALJ did not achieve

1 the level of specificity required and should reevaluate Dr. Carstens's opinion on remand.

2 *See id.*

3 **3. Nicole C. Winters, Psy.D.**

4 Reed argues that the ALJ erred by failing to give a sufficient reason to discount or
5 to fully incorporate the opinion of examining psychologist Nicole C. Winters, Psy.D. *See*
6 Dkt. 9 at 8-10. The Court agrees.

7 Dr. Winters examined Reed in September of 2013 opined that Reed would need
8 supervision and coaching for complex tasks, would have difficulty working with
9 supervisors, coworkers, and the public, would not do well with changes in the workplace,
10 and should be provided with written instructions and examples whenever possible. *See*
11 AR 441. The ALJ gave Dr. Winters's opinion moderate weight to the extent it was
12 consistent with the RFC, finding that the opinion was mostly consistent with the objective
13 evidence. *See* AR 28. The ALJ gave no reason to discount any workplace functions not
14 incorporated into the RFC.² *See id.* While the RFC included limitations to unskilled,
15 routine work and to little contact with the public and coworkers, it did not accommodate
16 difficulty working with supervisors or needing written instructions. *See* AR 21.
17 Therefore, the ALJ erred in his evaluation of Dr. Winters' opinion as well.

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22 ² The ALJ again found that a low GAF score was inconsistent with Reed's activities but otherwise gave no reasons to discount the specific workplace limitations to which Dr. Winters opined. *See* AR 28.

1 **4. Michael Brown, Ph.D., and Edward Beatty, Ph.D.**

2 Reed argues that the ALJ erred by failing to give a sufficient reason to discount or
3 to fully incorporate the opinions of state agency psychological consultants Michael
4 Brown, Ph.D., and Edward Beatty, Ph.D. *See* Dkt. 9 at 10-11. The Court agrees.

5 Dr. Brown opined, and Dr. Beatty concurred, that Reed would have several
6 cognitive and social limitations, including a moderate limitation in his ability to accept
7 instructions and respond appropriately to supervisors and a need for written instructions.

8 *See* AR 96, 147. The ALJ gave these opinions some weight, incorporating cognitive
9 limitations into the RFC, but failing to give any reason not to accommodate difficulty
10 working with supervisors or needing written instructions. *See* AR 21, 26. The ALJ cites
11 Reed's daily activities and the objective evidence generally as reasons not to find that
12 Reed's mental impairments combined to meet a listing at step three of the sequential
13 evaluation process. *See* AR 26. However, the ALJ gives no reason why certain specific
14 workplace limitations to which the consultants opined were not incorporated into the
15 RFC. *See id.* Therefore, the ALJ should reevaluate these opinions on remand as well.

16 **5. Susan Hakeman, M.D.**

17 Reed argues that the ALJ erred by failing to give a specific and legitimate reason
18 supported by substantial evidence to discount the opinion of examining psychiatrist
19 Susan Hakeman, M.D. *See* Dkt. 9 at 11-14. The Court disagrees.

20 Dr. Hakeman examined Reed in April of 2015 and opined that Reed had several
21 severe limitations in both cognitive and social workplace functions. *See* AR 659. The
22 ALJ gave Dr. Hakeman's opinion little weight because it was "markedly inconsistent"

1 with the examination findings, which were largely normal. *See AR 28.* An ALJ need not
 2 accept a physician's opinion if that opinion is inadequately supported by the physician's
 3 clinical findings. *See Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir.
 4 2004). Here, Dr. Hakeman failed to identify any specific symptoms she observed or
 5 comment on their severity and frequency. *See AR 658.* Dr. Hakeman performed a
 6 mental status examination, but the results were almost entirely within the normal ranges.
 7 *See AR 660.* Therefore, substantial evidence supports the ALJ discounting the severe
 8 limitations to which Dr. Hakeman opined because they were inconsistent with the clinical
 9 findings.

10 **B. Lay Witness Evidence**

11 Reed argues that the ALJ erred in evaluating the lay witness testimony of his
 12 mother Linda Reed. *See Dkt. 9 at 14-16.* The Court agrees.

13 "In determining whether a claimant is disabled, an ALJ must consider lay witness
 14 testimony concerning a claimant's ability to work." *Stout*, 454 F.3d at 1053. If an ALJ
 15 disregards the testimony of a lay witness, the ALJ must provide reasons "that are
 16 germane to each witness." *Nguyen*, 100 F.3d at 1467.

17 Here, the ALJ discounted Ms. Reed's testimony because of its "inconsistency with
 18 the objective medical evidence and medical opinions of record."³ *See AR 28.* An ALJ
 19 may not reject lay witness evidence merely because it is not supported by the medical

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 21 ³ The ALJ also discounted Ms. Reed's testimony due to her lack of medical training and
 22 because she was not a disinterested party, but the Commissioner concedes that these reasons
 were in error. *See Dkt. 10 at 10.*

1 evidence in the record. *See Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009). The
2 Ninth Circuit has previously held that “[o]ne reason for which an ALJ may discount lay
3 testimony is that it conflicts with medical evidence.” *Lewis v. Apfel*, 236 F.3d 503, 511
4 (9th Cir. 2001). However, the ALJ’s dismissal of the lay witness testimony in this case is
5 more analogous to *Bruce*, in which the ALJ did not point to any specific conflicting
6 evidence, than to *Lewis*, in which the ALJ selected specific testimony that was in conflict
7 with pieces of the medical record. *See Bruce*, 557 F.3d at 1116; *Lewis*, 236 F.3d at 511.
8 Considering that the ALJ also noted Ms. Reed’s lack of medical training, the ALJ appears
9 to have, as in *Bruce*, improperly discounted in general the value of lay testimony in
10 comparison to objective medical evidence. *See* AR 28. In doing so, the ALJ erred here.

11 **C. The RFC and Step-Five Finding**

12 Reed argues that the ALJ’s RFC assessment and step-five finding are not
13 supported by substantial evidence due to the aforementioned errors. *See* Dkt. 9 at 16-17.
14 As discussed above, because the ALJ erred in assessing the medical evidence and the lay
15 testimony, the RFC analysis was not complete, and the ALJ’s step-five determination is
16 not supported by substantial evidence and is in error.

17 The Court may remand this case “either for additional evidence and findings or to
18 award benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when
19 the Court reverses an ALJ’s decision, “the proper course, except in rare circumstances, is
20 to remand to the agency for additional investigation or explanation.” *Benecke v.*
21 *Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). Thus, it is “the unusual
22 case in which it is clear from the record that the claimant is unable to perform gainful

1 employment in the national economy,” that “remand for an immediate award of benefits
2 is appropriate.” *Id.*

3 Benefits may be awarded where “the record has been fully developed” and
4 “further administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at
5 1292; *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits
6 should be awarded where:

7 (1) the ALJ has failed to provide legally sufficient reasons for rejecting
8 [the claimant’s] evidence, (2) there are no outstanding issues that must
be resolved before a determination of disability can be made, and (3) it
is clear from the record that the ALJ would be required to find the
claimant disabled were such evidence credited.

10 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir.
11 2002). Here, issues still remain regarding conflicts in the medical evidence over Reed’s
12 functional capabilities and his ability to perform work despite any additional functional
13 limitations. Accordingly, remand for further consideration is warranted in this matter.

14 **VIII. ORDER**

15 Therefore, it is hereby **ORDERED** that the Commissioner’s final decision
16 denying Reed disability benefits is **REVERSED AND REMANDED**.

17 Dated this 15th day of March, 2017.

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BENJAMIN H. SETTLE
United States District Judge